

Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly or recklessly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction directly adverse to the position of the client and not disclosed by opposing counsel.

(b) A lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(c) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(e) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(a) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false or is reckless with respect to its truth.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] The Utah rule is different from the ABA Model Rule. In *In re Larsen*, 2016 UT 26, 379 P.3d 1209, the Utah Supreme Court held that the former rule's plain language required finding actual knowledge before an attorney could be found to have violated the rule, and that language in former Comment [3]

38 permitted finding a violation on something less than actual knowledge. The amendments to Rule 3.3(a),
39 and to Comments [2], [4], [5] and [9] permit finding a violation of the rule if an attorney recklessly, as
40 defined in Rule 1.0(h), makes a false statement of law or fact or fails to disclose controlling authority.

41 **Legal Argument**

42 [4] Legal argument based on a knowingly or recklessly false representation of law constitutes
43 dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but
44 must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an
45 advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been
46 disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to
47 determine the legal premises properly applicable to the case.

48 **Offering Evidence**

49 [5] Paragraph (b) requires that the lawyer refuse to offer evidence that the lawyer knows to be false,
50 regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court
51 to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the
52 lawyer offers the evidence for the purpose of establishing its falsity.

53 [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false
54 evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the
55 persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer
56 the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness
57 to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows
58 is false.

59 [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in
60 criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a
61 witness or to give a narrative statement if the accused so desires, even if counsel knows that the
62 testimony or statement will be false. The obligation of the advocate under the Rules of Professional
63 Conduct is subordinate to such requirements. See also Comment [9].

64 [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is
65 false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of
66 fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See
67 Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other
68 evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

69 [9] Although paragraph (b) only prohibits a lawyer from offering evidence the lawyer knows to be
70 false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes
71 is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of
72 evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections
73 historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer
74 the testimony of such a client where the lawyer reasonably believes but does not know that the testimony

75 will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's
76 decision to testify. See also Comment [7].

77 **Remedial Measures**

78 [10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know
79 that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness
80 called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct
81 examination or in response to cross-examination by the opposing lawyer. In such situations or if the
82 lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take
83 reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with
84 the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's
85 cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails,
86 the advocate must take further remedial action. If withdrawal from the representation is not permitted or
87 will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is
88 reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information
89 that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be
90 done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

91 [11] The disclosure of a client's false testimony can result in grave consequences to the client,
92 including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But
93 the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding
94 process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is
95 clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the
96 client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep
97 silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

98 **Preserving Integrity of Adjudicative Process**

99 [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that
100 undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully
101 communicating with a witness, juror, court official or other participant in the proceeding, unlawfully
102 destroying or concealing documents or other evidence or failing to disclose information to the tribunal
103 when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial
104 measures, including disclosure if necessary, whenever the lawyer knows that a person, including the
105 lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to
106 the proceeding.

107 **Duration of Obligation**

108 [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact
109 has to be established. The conclusion of the proceeding is a reasonably definite point for the termination
110 of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in
111 the proceeding has been affirmed on appeal or the time for review has passed.

112 Ex Parte Proceedings

113 [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a
114 tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the
115 opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining
116 order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is
117 nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the
118 absent party just consideration. The lawyer for the represented party has the correlative duty to make
119 disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary
120 to an informed decision.